NO. 2818

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARY KALEIALII, REBECCA LEHIA MILES and ANNIE K. BOYD and ROBERT N. BOYD, and VICTOR K. BOYD, by their Guardian ad Litem, JOSEPHINE BOYD,

Plaintiffs in Error,

vs.

HENRIETTA SULLIVAN, JOHN BUCKLEY and HENRY HOLMES, Trustees under the Will of John J. Sullivan, HENRIETTA SULLIVAN, JOHN BUCKLEY, PRISCILLA ALBERTA SULLIVAN CLARKE and ROBERT KIRKWOOD CLARKE, a Minor, JUANITA ELLEN CLARKE, a Minor, and THOMAS WALTERS CLARKE, a Minor,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR

UPON WRIT OF ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

HOLMES & OLSON,
FREAR, PROSSER, ANDERSON & MARX,
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Both plaintiffs and defendants in error claim title to the land in question from a common source, namely, the deed of September 15, 1858, from Alexander Adams, Jr., to his daughters Peke and Maria. (R., pp. 40-44).

The plaintiffs in error claim that that deed gave only a life estate in one-half of the land to each of the grantees (Peke and Maria) with remainders in fee simple to their respective children, and that on

the death of Peke on July 5, 1914, her life estate ended and a remainder in fee simple in her half of the land became vested in her two surviving children, namely, Mary Kaleialii (one of the plaintiffs) and Robert N. Boyd, who was the only other original plaintiff but upon whose death, after the commencement of the action, his children were substituted in his place as co-plaintiffs with Mary Kaleialii.

The defendants in error claim that the deed to Peke and Maria gave them each a fee simple in half of the land and that Peke's interest passed to Maria by her two deeds of 1868 and 1885, and that the fee simple in both halves or the whole of the land passed by subsequent deeds from Maria through Robertson and Bolte to the defendants, who have been in undisturbed possession, claiming under such deeds a fee simple title to the whole land and expending large sums in improvements on the land for the last thirty years.

I.

This case may easily be decided on a question of law, namely, the construction of the deed from Adams to Peke and Maria, and that too by the application of elementary and well established principles, which have been applied repeatedly in recent decisions of the Supreme Court of the Territory of Hawaii, from whose decision in this case this appeal comes.

The grant and habendum of this deed clearly con-

vey to Peke and Maria an estate in fee simple. Counsel for plaintiffs in error admit this by their statements: "And then follows the granting words of said deed which are in the usual form." (Brief of Plaintiffs in Error, p. 13, last 3 lines.) "Then follows the habendum which if read and considered by itself would probably defeat the contention of these Plaintiffs." (Brief of Plaintiffs in Error, p. 14, first 3 lines.)

Certain other parts of the deed also show that this was the intention, and upon all of these, defendants rely. Certain expressions of a more or less ambiguous and inconsistent character, if detached from the context, seem to indicate that under certain contingencies the grantees were intended to take only a life estate. The plaintiffs rely on these expressions.

It is true that in construing a deed as well as a will the court endeavors to ascertain and carry out the intention of the parties. This of course means the intention as expressed by the words of the instrument. *Mercer vs. Kirkpatrick,* 22 Haw. 644; *Smith vs. Lucas* (1881), 18 Ch. Div. 531; *In re Fish, Ingham vs. Raynor* (1894), 2 Ch. 83; *Scale vs. Rawlins* (1892), A. C. 342, also cases *infra.* Even applying that rule the plaintiffs' contention should not prevail here taking the deed as a whole, but even that rule is subject to certain well established rules of law to which a grantor must conform if he would make effectual his intention.

In general, if the granting part of a deed clearly conveys a fee simple and the subsequent parts indicate that only a life estate was intended to be conveyed, the granting part will control, because that comes first and after a fee simple has been granted it can not afterwards be taken back either in whole or in part by the later provisions. If, however, the granting part is ambiguous and the later provisions are clear, the former may be explained and controlled by the latter. If the granting and habendum parts are clear and the subsequent provisions are ambiguous or inconsistent, we have the strongest case possible for giving effect to the granting part alone. That is the case in this instance. Another reason given by the courts for holding that a fee simple was conveyed is that the courts naturally lean toward a construction which will prevent the land from being tied up in the life estate and remainders and so kept out of the market.

Let us now examine the deed. (R., pp. 40-44.) It starts out in its introduction with these significant words declaratory of the general intention: "This deed is an *absolute conveyance*" from Alexander Adams, Jr., to Peke and Maria, his daughters.

Next come two recitals, the first of which is as follows:

"Witnesseth: That the above named Alexander Adams, Jr. of his own volition, in order to provide for his daughters Peke and Maria so as to prevent unavoidable inconvenience and for the care of their person with things necessary as well as their maintenance."

This expresses the object of the deed to be "in order to provide for his daughters Peke and Maria." No others are mentioned. And this the property conveyed will do by providing "for the care of their person with things necessary as well as their maintenance."

Counsel are hard pressed when they say "this * * shows a clear intention to limit the estate granted to a life interest." (Brief of Plaintiffs in Error, p. 13.)

The second recital is as follows:

"And Whereas, the said Alexander Adams, Jr., because of his own desire for the aforesaid daughters that they may be benefited with the proceeds arising therefrom together with the rents to their children and assigns as well as the payments to be made for the real estate hereunder conveyed and described premises to the end of their lives and forever to their heirs, independent of all restraint and interference of their husbands or those they may have hereafter, providing no conveyance is made to their husbands."

Of this recital, the words "that they (Peke and Maria) may be benefited with the proceeds arising therefrom together with (that is, in addition to) the rents * * * * * as well as the payments to be made for the real estate hereunder conveyed and described" are consistent only with the right to sell, which is a right attached to the ownership of the fee. If Peke and Maria could not sell, there could be no "payments to be made for the real estate conveyed" by the grantor to his daughters and probably

no "proceeds arising therefrom together with (that is, in addition to) the rents."

It will be noticed further that the words "their children and assigns" couple the "assigns" of Peke and Maria with their "children." The fact that Peke and Maria's assigns are on an equality with their children shows that no gift was intended to be made to their "children" because a gift to a man's assigns is a contradiction. A man's assign is the person to whom he (not another) gives or transfers property. The word "children" is therefore used in the sense of heirs. If any doubt about this exists so far, the words "and forever to their heirs" later in the same recital should remove it. The words "assigns" and "heirs" and the provision that they should not convey to their husbands indicate also that they might convey to others and that except for such provision they might convey to their husbands. In other words, that they have a fee simple estate.

Of course, what we are concerned to find is not what Alexander Adams, Jr., had in his mind or what he hoped to accomplish when he executed this deed, but what he by this deed did do.

What counsel ask the Court to do is to change the grant and the habendum, which are consistent with one another and which admit of one meaning only, to give effect to a few words in a recital which are inconsistent with the context and the meaning of which recital is surely ambiguous.

Then follows the granting part in which Adams doth "make, sell, grant, convey, release, effectuate

and *forever quit claim*" to his daughters the land in question.

Next comes the habendum, which is unusually full, covering not only the land and the houses and appurtenances, rights, and privileges, either in law or equity, but also "all things together with the interest and rights appertaining to the party of the first part shall belong to Peke and Maria and to their representatives and heirs and assigns forever." The last words, namely, "heirs and assigns forever," are the most usual and apt words known to the law to convey a fee simple. Moreover, this habendum expressly gives to the daughters "the interest and rights appertaining to" the grantor himself, and since he had a fee simple the same estate is given by this habendum to the daughters.

Thus the introduction, the granting part and the habendum all clearly disclose an intention to grant a fee simple; and even the recital, which is less important, points in the same direction as far as it goes.

After the habendum comes the following clause upon which plaintiffs rely:

"And the above mentioned Alexander Adams, Jr., and until the decease of his daughters they shall leave these lands and rights appertaining to whomsoever they may devise, providing it be done in truth and honesty but should it not be made in accordance with the above such as the conveyance and the acknowledgment thereof, then in such case these lands should revert together with all appurtenances to Alexander Adams, Jr., of the first part and to his

heirs and the benefits shall only be theirs providing the second party have no children, but in the event that the parties of the second part having children all the rights shall descend to them in the manner as enjoyed by their parents.

"Provided that if one of the parties of the second part shall die without any issue living at the time, all the rights above mentioned shall descend to the survivor of them."

(On pages 12, 14 (twice) and 15 of Brief of Plaintiffs in Error, the word "demise" should read "devise." The same error in places appears in the Record. But on pages 43 (Reservations of Questions of Law), 53, 56 and 60 (decisions of Supreme Court of Hawaii) of the Record the correct word is used, as well as on page 9 of Brief of Plaintiffs in Error.)

The clause following the habendum does not seem to present much difficulty. It provides that the daughters shall have the right during their lives to dispose of "these lands and rights appertaining to whomsoever they may devise, providing it be done in truth and honesty," that is, as he afterwards explains, "such as the conveyance and acknowledgment thereof."

While the word "devise" is an appropriate word for a disposition of real estate by will, yet, in *Kalihilihi vs. Kama,* 5 Haw. 330, it was held to mean "to pass over" to, and the words "conveyance and the acknowledgment thereof" are only appropriate to a transfer by deed. And a sale in their lifetime would be necessary to bring in "the payments to be made

for the real estate hereunder conveyed and described" mentioned in the second recital.

The meaning of the word "acknowledged" appears to have been understood by the grantor, as in the general description of the property conveyed we find these words: "deeded to me on the 3rd day of August, 1854, Royal Patent 1918 acknowledged on the 11th day of April, 1855" and "the houselot sold to me by deed from Alexander Adams signed on the 22nd day of June 1850 and acknowledged by A. Bates on the 22nd day of August, 1850." (R., p. 41.) Further, the deed itself was a conveyance acknowledged by the grantor. (R., p. 44.)

It is only in case the disposition of the lands and rights appertaining are not made in accordance with truth and honesty ("such as the conveyance and acknowledgment thereof") that "these lands" *revert* to Alexander Adams, Jr., and to his heirs, or "all the rights shall *descend*" to the children of Peke and Maria "in the manner as enjoyed by their parents." If Peke and Maria, as counsel for plaintiffs in error contend, were to enjoy life estates only, then their children could not enjoy more, and as one of Peke's two children (Robert N. Boyd) is dead, it is difficult to understand what right his children have to any share of the property, and if the grantor died intestate as to any interest in the property, Peke and Maria would inherit it as his heirs at law.

Counsel for plaintiffs admit the power of the daughters to sell and convey the property when they state (Brief, pp. 19, 20), "In the paragraph follow-

ing the habendum, Alexander Adams, Jr., vests his daughters with the power of appointment 'providing it be done in truth and honesty'," that is, not what counsel state, "if done honestly and not for the purpose of defeating the rights of such children as might survive the parents" (Brief, p. 15, 2nd, 3rd and 4th lines from top of page) but, as the grantor himself explains, "such as the conveyance and acknowledgment thereof."

That the deed recognizes the right of the grantee to sell the property is clear from the many expressions in it which are consonant only with such a construction, but strictly speaking there is no power of appointment given to the grantees, although if there were, then the daughters exercised it when they sold and conveyed the property, as the record shows they did, and counsel for plaintiffs admit they did in these words: "It further appears from the evidence that the said daughters executed deeds of said land and, by mesne conveyances, it became the property of the defendants." (Brief, p. 2, lines 11, 12, 13 and 14 from the top.)

In view of this admission it is difficult to see what right they have to ask the Court to reverse the decision of the court below. If, as they seem to think, a trust was created and the grantees were trustees for their children, as they practically admit that the grantees had the power to sell, these children must look, not to the property which was sold, but to the trustees to account for the proceeds of sale.

We shall attempt a more searching analysis of

this clause of the deed as it is the one on which plaintiffs mainly rely. It contains several clauses which may be stated simply as follows:

(a) "Until the decease of the daughters they shall leave these lands and rights appertaining to whomsoever they may devise providing it be done in truth and honesty" ("such as the conveyance and acknowledgment thereof");

(b) "But should it not be made in accordance with the above, such as the conveyance and acknowledgment thereof, then in such case these lands should *revert,* together with all appurtenances, to Alexander Adams Jr., and to his heirs and the benefits only shall be theirs, provided the second party have no children";

(c) "But in the event that the parties of the second part having children all the rights shall *descend* to them in the manner *enjoyed by their parents*"; and

(d) If either one of the daughters shall die without any issue living, "all the rights above mentioned shall *descend* to the survivor of them."

Each of these clauses contains an indication that a fee simple had been granted in the earlier part of the deed.

For instance, clause (a) shows that the daughters were to have the power until their decease to devise these lands and rights appertaining to whomsoever they please. Clause (b) shows that the fee simple ("these lands" "together with all appurtenances") was to *revert* to the grantor and his heirs only on

certain contingencies, and that if these contingencies did not happen it was to be in the grantees. If they had only an estate for life how would these lands revert to the grantor and his heirs? One of these contingencies was that the grantees should have no children. Hence, if the plaintiffs were Peke's children, that contingency did not happen. Clause (c) shows that if the daughters had children all the rights shall *descend* to them in the manner as enjoyed by their parents; in other words, that if their parents had a fee simple they were to have a fee simple, and that their parents did have a fee is clear, for there was no intention to give the children and the parents each only a life estate. Clause (d), by indicating that if one daughter should die without issue all the rights above mentioned in the deed should *descend* to the surviving daughter, shows that the rights previously mentioned were in fee simple and not an estate for life.

Again, these clauses are inconsistent with each other. For instance, Clause (a) recognizes the right of the daughters to devise "these lands and rights appertaining to whomsoever" they please, whether they leave any children or not, while Clause (d) provides that if one of them leave no children these rights should descend to the other whether she attempted to devise the land or not. Again, Clause (b) provides that if they leave no will and no children the lands should revert to the grantor, while Clause (d) provides that in the same event the land should descend to the survivor.

The only clause under which the plaintiffs could pretend to claim directly is Clause (c), but this is at least uncertain in its meaning. The plaintiffs contend that if one of the daughters should leave children the land would go to those children by way of remainder rather than by way of descent, although the word in the deed is "descend." If this clause did mean that, it could not be given effect because it would be inconsistent with the granting and other earlier parts of the deed. But it may just as well mean merely that this clause was intended to declare the result, as understood by the grantor, of the granting and other earlier parts of the deed. In other words, while the grantor may have tried to place some restrictions on the daughters by Clause (b), he in this clause (c) merely declared what he had already indicated in the earlier parts of the deed, that if the daughters had children their estate would naturally descend to them in the manner enjoyed by their parents, and if their parents had a fee simple, of course the children would take a fee simple by descent from them—if the parents did not dispose of the fee by will or deed. The use of the word "descend" in the deed in the two clauses (c) and (d) certainly supports this view. The children were to take only in the manner enjoyed by their parents, and if their parents took only a life estate they would similarly take only a life estate. That would be the conclusion from the plaintiffs' argument—a conclusion which the plaintiffs themselves would hardly welcome. In that case, Robert Boyd,

one of the children, having died, his life estate, if he had one, has ended.

The burden of the plaintiffs' argument, indeed, seems to be, not so much that a fee simple was given directly to them as that only a life estate was given to Peke and that therefore by inference a remainder in fee must have been intended for her children, an unwarranted inference.

The plaintiffs contend also that resort should be had to the Hawaiian version of the deed. We cannot see that this would help them any. However, the translation was agreed upon by the parties as correct. It is the translation which the plaintiffs themselves made a part of their complaint.

Thus we have the unusually strong case for the defendants of the granting part, the habendum and other earlier parts of the deed clearly granting a fee simple, the plaintiffs attempting to overcome these clear earlier parts by the selection of a few words from a later clause which is inconsistent and ambiguous and which, as we have shown, is not in accord with their theory that a mere life estate was given by Alexander Adams to Peke and Maria.

We shall now deal with the authorities quoted by counsel in support of their contention.

Nahaolelua vs. Heen, 20 Haw. 377:

Surely the intent of the deed in question was to convey an estate in fee simple to the grantor's daughters, Peke and Maria. The grant and the habendum have no other meaning, as counsel admit. And the

recitals as well as the clause following the habendum contain clauses which are quite consistent with such an estate, which gives complete power of alienation. It is only in case they do not exercise the right to leave the property to whomsoever they may devise, which they have during their lives ("until the decease of his daughters") in truth and honesty ("such as the conveyance and the acknowledgment thereof"), that the land reverts to the grantor. It has not been shown nor can it be shown that the conveyance by which the land was conveyed by Peke and Maria to their grantee was not truthfully and honestly conveyed and acknowledged.

Budd vs. Brooks, 43 Am. Dec. 337-8:

In the above case the deed recited, or, to use the words of the decision, the deed "states in substance that the grantees had applied for the grant to be issued to them agreeably to the devise or 'bequest' in the last will and testament of Thomas Brooke and that the grantor had agreed to make the grant accordingly. And it proceeds to state that 'therefore in consideration' thereof, that is, in pursuance of such intent and agreement, the grantor did 'give, grant and confirm unto the grantees the aforesaid tracts or parcels of escheat land now re-surveyed with the vacancy added reduced into one entire tract and called Nonesuch and bounded as follows'." The habendum was as follows: "To have and to hold the same unto the said Sarah Brooke, Walter Brooke and Richard Brooke their heirs and assigns forever

to be holden of us and our heirs in free and common socage by fealty only." The decision shows that if the habendum had controlled, the grantees were joint tenants and on the death of Sarah and Richard "then the lands so granted devolved upon the said Walter," by survivorship. The court, however, held that there was a conflict between the grant (which conveyed to the grantees as tenants in common) and the habendum, and that the limitation contained in the habendum must be rejected. In the case before the Court there is no conflict between the grant and the habendum.

Bent vs. Rogers, 137 Mass. 192:

We have read this case with care, but do not see its relevancy to the question before the Court.

Devlin on Deeds, Sec. 837:

In this section, 837, of the second edition, we find the following sentence, although it is not specifically referred to by counsel for appellants:

"If the deed contains a clause decisively showing the intention of the parties, ambiguities and inconsistencies in other clauses of the deed will not defeat such intention. As said by Lord Wensleydale, 'The question is not what the parties to a deed may have intended to do by entering into that deed, but what is the meaning of the words of that deed, a most important distinction in all classes of construction and the disregard of which often leads to erroneous conclusions'."

If language has any meaning, it is clear that what Alexander Adams, Jr., did by the deed under con-

struction was to convey an estate in fee simple in the lands mentioned in the deed to his daughters, Peke and Maria. The grant and the habendum have no other meaning. What counsel ask is that the Court take a part of a recital (which might be resorted to in the case of a conflict between the grant and the habendum to explain what was not clear), a recital which is surely ambiguous and inconsistent in itself, and a clause subsequent to the habendum which is ambiguous, inconsistent, and as helpful to the defendants as to plaintiffs, and use them to defeat the words of the deed whose province it is to convey and mark off the estate to be conveyed.

Coleman vs. Beach, 97 N. Y. 545:

In this case land was conveyed in fee to enable the grantee to convey in fee simple if she should desire to do so. It also contained a covenant by the grantee that upon sale by her she should cause the proceeds to be properly invested and at her decease the premises or the principal realized from the sale should be conveyed to the issue of the marriage with the grantor's son living at the time of her decease or their legal representatives. The grantee died without having sold the real estate but leaving a will by which she devised the same to her son with power to her executor to sell and convey. It was held that the grantee took only a life estate with remainder in fee to the issue of her marriage and with power in the grantee to sell and convey during her life. The court explains the reasons for its decision in the following words:

"Yet when the whole of the instrument is considered together the apparent repugnance is obviated by the express declaration that the form of the grant was adopted for the purpose, only, of enabling the grantee to sell and convey in fee simple the property described. The same repugnance, and no greater, occurs in all conveyances of property in trust which by the title is vested in trustees but is made subject to the particular object defined in the subsequent clauses of the grant."

Flagg vs. Eames, 40 Vt. 16:

At page 22, the court quotes with acceptance from 3 Atk. 136, the words of Lord Ch. J. Willes: "That words are not the principal thing of a deed but the intent and design of the grantor ("we have no power indeed to alter the words or to insert words which are not in the deed") and that the words are to be construed in a manner most agreeable to the meaning of the grantor and that words which are merely insensible are to be rejected. It has always been recognized as a cardinal principle in the interpretation of deeds that the intention of the grantor *when it is plainly and clearly expressed* or can be collected or ascertained from the deed, is to be observed or carried into effect unless it is in conflict with some rule of law and that whatever is repugnant to the general intention of the deed or the obvious particular intention of the grantor is to be rejected if such intention is consistent with the rules of law."

After stating that "the ante-nuptial settlement, which is the act of both parties, contains a distinct recognition of the fact that the estate conveyed to her

by the deed was only a life estate" (p. 23), the court on the same page further says: "The terms in this deed which indicate the purpose to convey a life estate are a part of the grant." They appear between the words of the grant and the habendum.

The other cases cited by counsel for appellants, chiefly decide that where the grant and the habendum conflict the habendum must be disregarded. In the case before the Court the grant and habendum agree, and convey the same estate, an estate in fee simple, to Peke and Maria. What counsel ask the Court to do is to treat the recitals as part of the grant. They have a different purpose and are only to be resorted to in cases where the grant is not clear.

THE CASES.

Turning now to the decisions, we will cite three cases decided recently by the Supreme Court of Hawaii, all reported in the 20th volume of the Hawaiian Reports.

The leading case is *Simerson vs. Simerson,* 20 Haw. 57. This was not nearly so strong a case as the present case for the defendants, and yet the court held that the subsequent clauses should not control the earlier provisions. In the *Simerson* case the granting part was qualified to some extent by a reservation. Then followed an express prohibition against selling the land or mortgaging it. Then the habendum contained no words indicating a fee simple.

Finally, the subsequent provision relied on to control the earlier provisions expressly stated that after the death of the grantee the land was to descend to her children and to the heirs and assigns of her children forever, thus indicating that there was to be a break in the estate at her death and that her children were to take by way of remainder, and yet the court held that that clause could not control. The opinion was by the late Chief Justice Hartwell, who reviewed the decisions elsewhere somewhat extensively, including the decisions relied on by the other side in that case. Mr. Justice Perry dissented, but only on the ground that the case came within the rule above mentioned in this brief, that where the granting part was uncertain and the subsequent provision certain the former could be explained or controlled by the latter. He did not question the rule that where both parts were certain the first part should control, and much less the rule that where the first part was certain and the last part uncertain, the first part should control.

This decision was followed a little later by the court constituted of the same judges in the case of *Nahaolelua vs. Heen,* 20 Haw. 372, at the bottom of page 377, Mr. Justice Perry agreeing with the other judges on the application of the rule now contended for.

Finally, in *Lucas vs. Lucas,* 20 Haw. 433, at page 441, the same rule was applied by the same court, but with Chief Justice Hartwell succeeded by Chief Justice Robertson.

See also, by way of illustration, *Pritchett vs. Jackson,* 103 Md. 696; *Teague vs. Sowder,* 121 Tenn. 132, 160-169; *Blackwell vs. Blackwell,* 124 N. C. 269; *Hughes vs. Hammond,* 136 Ky. 694 (125 S. W. 144); *Dickson vs. Van Hoose,* 157 Ala. 459 (47 So. 718); also the cases cited in this case in the decision of the Hawaiian Supreme Court (R., pp. 57-61).

As to the right of the grantor to use the word "devise" in a deed as a word of conveyance, the Court is referred to *Morrison vs. Wilson,* 30 Cal. 344.

As to the Federal Court holding itself bound to follow the decision of the State Courts in just such cases as this, see *Dickson vs. Wildman,* 175 Fed. 580, 183 Fed. 398.

It would be difficult to imagine a stronger case than the present for the defendants for the application of the rule that the estate granted in the earlier part of the deed cannot be cut down by later provisions. In most cases of this sort, the courts have held that the granting part controls the habendum. But in the present instance, it is a case of the granting part, the habendum and the introduction together, all clear, controlling certain ambiguous later expressions.

Counsel call attention to the fact that the Adams deed was in Hawaiian and drafted (in 1858) "only a quarter of a century after civilization was introduced into these Islands." Peke conveyed her interest in the property in 1868, and Maria conveyed the property so long ago that by mesne conveyances

it was conveyed to defendant John Buckley and John J. Sullivan in 1894. Therefore, we have the fact that the persons who knew the language in which the deed is written construed it as conveying the property to them. The heirs of Maria, who died twenty-four years ago, could have raised the question at any time during that period, but there is no evidence that they ever did raise the question. Apparently they took the view of all the others that the deed from Adams conveyed a fee simple.

"It is obvious what hesitation an American court ought to feel in attempting to construe a Hawaiian will on the strength of this translation, and still more, in disregarding the opinion of the court on the spot, familiar with Hawaiian habit, and not improbably with Hawaiian speech."

John Ii Estate, Ltd., vs. Brown, U. S. Supreme Court Reports, 59, Law Ed., 259.

It is true that Mary and Robert could not bring an action for the possession of the land until their mother Peke died in July, 1914, but they had both become of age more than thirty years ago and before the last deed from Peke to Maria and the deed from Maria to Robertson and Bolte and subsequent deeds, and must have known of these important transactions in connection with the family property and must have known of the occupation and improvement of the land by the defendants, and, even aside from the possibility of their bringing a proceeding in the court of land registration to settle the question,

might at least have warned the defendants and thus prevented them from expending further sums in improving the land without first having the title judicially determined.

In other words, if there were any doubt in this case the equities should lead the court to lean toward the construction of the deed which would protect the parties who have been in possession so long and improved the land and the construction which has been accepted on all sides for so many years, and against the construction that would enable the plaintiffs to come in at this late day to raise a question of uncertainty as to the title.

Dated, Honolulu, T. H., October 16, 1916.

Respectfully submitted,

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